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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONALD LEE GORDON, Defendant and Appellant.	G053392 (Super. Ct. No. M-9642) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael A. Leversen, Judge. Affirmed. Appellant's Request for Judicial Notice. Denied.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury found Donald Lee Gordon to be a sexually violent predator under the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).[1] The trial court ordered him committed to the Department of State Hospitals (DSH) for an indeterminate term. Gordon appeals from the order of commitment. We affirm.

In briefs and supplemental briefs, Gordon makes the following 13 arguments:

1. The trial court erred by admitting exhibits that were inadmissible or partially inadmissible as hearsay and did not come within the hearsay exception of section 6600, subdivision (a)(3).

2. The trial court erred by permitting expert witnesses to testify to case-specific hearsay made inadmissible by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

3. The trial court's evidentiary errors, if individually harmless, were cumulatively prejudicial.

4. Under the SVPA, the district attorney was not allowed to hire his own mental health experts and have them testify at trial.

5. Section 5328 did not permit the disclosure of Gordon's treatment records to the district attorney's retained mental health experts.

6. The district attorney violated Gordon's rights by disclosing Gordon's confidential treatment information to the district attorney's retained experts by means of a hypothetical.

[1] Undesignated code references are to the Welfare and Institutions Code.

7. Section 5328 did not permit disclosure of Gordon's treatment records to the district attorney to the extent the information in the records was not included in an updated or replacement mental health evaluation.

8. Section 6603, subdivision (j)(1) (section 6603(j)(1)), which permits limited access to a sexually violent predator's treatment records, violates Gordon's equal protection rights.

9. Section 6603(j)(1) cannot be applied either retrospectively or prospectively to Gordon's case.

10. Under section 6603(j)(1), the district attorney's access to Gordon's treatment records is limited to those records used and relied upon by the evaluators in conducting updated evaluations under section 6603, subdivision (c)(1).

11. Section 6603(j)(1) does not permit the disclosure of Gordon's confidential information to an expert retained by the district attorney.

12. The trial court erred by compelling Gordon to submit to mental examinations by the district attorney's retained experts.

13. Recent amendments to the SVPA regarding conditional release mean the indeterminate term of confinement required under the SVPA violates Gordon's due process rights.

We address each of those arguments in the Discussion section. We conclude most of the challenged exhibits were admissible, and error in admitting the others or portions of them was harmless. Any *Sanchez* error was harmless, and there was no cumulative error. The district attorney was entitled to retain his own mental health experts and have them testify at trial. Argument nos. 5, 7, 8, 9, 10, and 11 have been decided adversely to Gordon by the California Supreme Court in *People v. Superior Court* (*Smith*) (2018) 6 Cal.5th 457 (*Smith*). The trial court did not compel Gordon to submit to mental examinations by the district attorney's experts. Finally, the recently

amended conditional release provisions of the SVPA do not violate Gordon's due process rights.

SVPA STATUTORY FRAMEWORK

The SVPA authorizes the state to civilly commit persons found to be sexually violent predators after they conclude their prison terms. (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646-647 (*Reilly*).) Section 6600, subdivision (a)(1) defines a sexually violent predator as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."

The Welfare and Institutions Code provides an outline of the procedure for determining whether a person is a sexually violent predator. (§ 6600 et seq.) When the Secretary of the Department of Corrections and Rehabilitation determines that a person in custody may be a sexually violent predator, the secretary refers that person for an initial screening. (§ 6601, subds. (a)(1) & (b).) "If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer that person to the [DSH] for a full evaluation." (§ 6601, subd. (b).)

The full evaluation is conducted by two mental health experts, either psychologists or psychiatrists, designated by the Director of the DSH (the Director). (§ 6601, subd. (d).) Each mental health expert must evaluate the person in accordance with a standardized assessment protocol "to determine whether the person is a sexually violent predator as defined in [section 6600]." (§ 6601, subds. (c) & (d).) "'The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders . . . ,' including 'criminal and psychosexual history, type, degree,

and duration of sexual deviance, and severity of mental disorder.' (§ 6601, subd. (c).)" (*Reilly, supra*, 57 Cal.4th at p. 647.)

"If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the [Director] shall forward a request for a petition for commitment under Section 6602." (§ 6601, subd. (d).) If the evaluators disagree on whether the person is a sexually violent predator, then the Director "shall arrange for further examination of the person by two independent professionals." (§ 6601, subd. (e).) At this stage, the petition "shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d)." (§ 6601, subd. (f).)

The attorney petitioning for commitment may request updated evaluations if it is determined they "are necessary in order to properly present the case for commitment" and may request replacement evaluations "[i]f one or more of the original evaluators is no longer available to testify." (§ 6603, subd. (c)(1).) "If an updated or replacement evaluation results in a split of opinion as to whether the individual meets the criteria for commitment, the []DSH must obtain two additional evaluations in accordance with subdivision (f) of section 6601. (§ 6603, subd. (c).)" (*Reilly, supra*, 57 Cal.4th at pp. 647-648.)

"After a petition for commitment has been filed in the superior court, and once replacement evaluations have been completed, a new round of proceedings ensues. 'The superior court first holds a hearing to determine whether there is "probable cause" to believe that the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release. [Citation.] . . . [I]f the court finds probable cause within the meaning of this section, the court orders a trial to determine whether the person is an SVP under section 6600.' [Citation.] Though civil in nature, this trial contains a number of procedural safeguards commonly associated with criminal trials,

including the alleged SVP's right to a jury trial (§ 6603, subd. (a)), to assistance of counsel (*ibid*.), and to a unanimous jury finding that he or she is an SVP beyond a reasonable doubt before he or she may be committed (§ 6604)." (*Reilly*, *supra*, 57 Cal.4th at p. 648.)

At trial, the People must prove three elements beyond a reasonable doubt: (1) the person has suffered a conviction of at least one qualifying "sexually violent offense," (2) the person has "a diagnosed mental disorder that makes the person a danger to the health and safety of others," and (3) the mental disorder makes it likely the person will engage in future predatory acts of sexually violent criminal behavior if released from custody. (§ 6600; see §§ 6603, 6604; *People v. Shazier* (2014) 60 Cal.4th 109, 126; *People v. Yates* (2018) 25 Cal.App.5th 474, 477 (*Yates*).)

If the court or jury finds the person is a sexually violent predator, then he or she is committed for an indeterminate term to the custody of the DSH. (§ 6604.) Following commitment, the sexually violent predator is subject to annual mental examinations to determine whether he or she continues to meet the definition of a sexually violent predator. (§ 6604.9, subds. (a) & (b).)

PROCEDURAL HISTORY

In 2002, the Orange County District Attorney filed a petition under the SVPA to commit Gordon as a sexually violent predator. The petition was supported by an evaluation conducted by Charles Jackson, Ph.D., and an evaluation conducted by Mark Schwartz, Ph.D. In 2004, the trial court found probable cause and ordered a trial.

In May 2015, the trial court granted the district attorney's motion for updated evaluations of Gordon under section 6603, subdivision (c)(1). Robert Owen, Ph.D., and Michael Musacco, Ph.D., examined Gordon and prepared updated evaluations in which both concluded Gordon no longer met the sexually violent predator criteria. Owen and Musacco forwarded their respective evaluations to the district attorney along with a list of records they had reviewed.

The district attorney served a subpoena duces tecum to obtain the records identified by Owen and Musacco in their evaluation reports. Gordon moved to quash the subpoena on the ground the records were immune from discovery under section 5328. The trial court denied the motion and found good cause for releasing the records.

The district attorney retained two experts (George Grosso, Ph.D., and Kathleen Longwell, Ph.D.) and moved for an order allowing them to review the records relied on by Owen and Musacco. The trial court granted the motion and issued an order authorizing Grosso and Longwell to conduct mental examinations of Gordon.

A jury trial on the SVPA petition began in March 2016. The jury found Gordon to be a sexually violent predator within the meaning of the SVPA. The trial court ordered him committed to the DSH for an indeterminate term.

FACTS

I.

Qualifying Offenses

Gordon was born in December 1939. In September 1975, he was charged with two counts of violating Penal Code section 288, subdivision (a) (lewd or lascivious act on a child) arising from conduct with his 13-year-old daughter, C.G. Gordon's sexual abuse of C.G. had started when she was about six years old. Gordon pleaded guilty to the charges. He was designated a mentally disordered sex offender (MDSO) and sent to Patton State Hospital for evaluation and treatment.

Gordon remained at the hospital for 26 months. In December 1977, he was released, MDSO proceedings were terminated, criminal proceedings were reinstituted, sentence was suspended, and Gordon was released on probation.

In May 1982, Gordon was charged with 34 counts of child sexual abuse. He pleaded guilty to six violations of section 288, subdivision (a) involving six female victims: L.B., E.C., T.H., S.H., C.R., and L.P. He was sentenced to 10 years in prison, served five years, and was paroled in 1987.

In 1992, Gordon was charged with three counts of violating Penal Code section 288, subdivision (a) and four counts of violating Penal Code section 647.6 (child molestation with a prior) arising out of the abuse of T.L. He pleaded nolo contendere to the charges and was sentenced to 16 years 4 months. He was paroled in 2000 but in 2002 violated parole by possessing pornography. Gordon has been in confinement since then.

II.

Victim Testimony

Two of Gordon's victims—L.B. and T.L.—testified at the trial on the SVPA petition. L.B. was a victim in the 1982 charges to which Gordon pleaded guilty. T.L. was a victim in the 1992 charges to which Gordon pleaded nolo contendere.

A. *L.B.'s Testimony*

L.B. was born in May 1968. She was 11 years old when she met Gordon and his girlfriend, Jody Jones. L.B.'s mother allowed Gordon and Jones to take L.B. to a nudist camp, where L.B. was required to be nude.

For the next few years, Gordon would drive nearly every weekend from Santa Ana to Riverside to pick up L.B. and take her back to his apartment. L.B. described Gordon's apartment as a "little nudist camp" because "as soon as you walk in the door, your clothes came off." About half the time that L.B. was at Gordon's apartment other children were present, although, she testified, "near the end it seemed like it was just me." Everyone in the apartment was naked. There was always a camera around, and Gordon would take pictures of L.B.

Gordon allowed L.B. to smoke cigarettes and gave her free access to marijuana and alcohol. He showed her pornography, and they watched the movie Pretty Baby 10 to 20 times.[2] Gordon would put his fingers in L.B.'s vagina "a lot" and would

[2] Pretty Baby is about a 12-year-old girl (played by Brooke Shields) who grows up in a brothel and includes a scene showing her naked body and depicting her losing her virginity.

sometimes touch her genitals during the Pretty Baby viewings as part of a contest to see whether L.B. or Jones could have the most orgasms.

Gordon pressured L.B. to give up her virginity to him, saying that he would be doing her a favor. Gordon routinely criticized L.B.'s parents, and Gordon told L.B. her father would be a "real father" if he had sex with her.

L.B. would not have sex with Gordon even though he and Jones were constantly trying to talk her into doing so. On two or three occasions, Gordon and Jones made L.B. watch them have sex. Once, Gordon held L.B. while engaging in sexual intercourse with Jones, and, eventually, Gordon orally copulated L.B. while engaging in sexual intercourse with Jones. They played a game called "truth or dare" in which Jones would orally copulate L.B. while L.B. would orally copulate Gordon.

B. *T.L.'s Testimony*

T.L. was born in 1982 and first met Gordon when she was four or five years old. She was friends with Gordon's son, St.G., and her mother was friends with Jones. Over the next five years or so, T.L. would often sleep overnight at Gordon's house. On more than two dozen occasions, Gordon rubbed and licked T.L.'s genitals when he thought she was sleeping. T.L. would pretend to be asleep because she did not know how to "tell him [she] didn't like what he was doing." Gordon also would rub his erect penis against T.L. while she sat on his lap to watch television.

Once, Gordon and Jones took T.L. and St.G. camping. While Jones and St.G. went to look for wood or rocks, T.L. stayed at camp with Gordon. He took T.L. to a large, hollowed-out tree. It was dark, and she felt Gordon moving and pressing himself against her. Gordon placed his fingers inside of her pants and on her vagina, massaged it, and then put at least one finger inside of her. This caused her great discomfort.

Later, when T.L. was about nine years old, Gordon took her to see the movie Beauty and the Beast. During the movie he rubbed her chest, thigh, and groin. That was the last time he touched her.

III.

Expert Witness Testimony

At trial, the district attorney called two expert witness: Grosso and Longwell. Neither had prepared any of the evaluations identified in section 6601 or 6603; both had been retained as experts by the district attorney. Gordon called three expert witnesses: Barbaree, Musacco, and Owen.

A. *Grosso's Testimony*

Grosso, a board-certified neuropsychologist and medical psychologist, was retained by the district attorney's office to evaluate Gordon. Grosso concluded that Gordon suffers from pedophilic disorder and is likely to engage in future sexually violent behavior because of that disorder. In forming his opinions, Grosso reviewed police reports, probation reports, Gordon's medical records, Gordon's records from Patton State Hospital and Coalinga State Hospital, and Gordon's prison records. Grosso interviewed Gordon for over three hours in December 2015 and prepared a report dated December 27, 2015.

Grosso's understanding of the circumstances surrounding the qualifying offenses committed by Gordon was based on police reports and investigations, which were received in evidence as exhibits 2, 3, 4, 5, 7, and 11. The first qualifying offense involved C.G. who, when 14 years old, reported that she and Gordon showered together, he would lay his penis on her vagina, and he would have her orally copulate him. C.G. described an incident in which she orally copulated Gordon, but he was not satisfied, so he masturbated and ejaculated. C.G. told the police that Gordon's behavior was frequent and had begun when she was seven or eight years old. She knew his behavior was inappropriate and wanted to tell him that "she wanted to have more of a father and less of a boyfriend."

Grosso believed that Gordon's molestation of his daughter suggested "a chronic mental issue" and "a mix-up . . . of relationship thoughts." Grosso testified that

C.G.'s detailed descriptions of Gordon's behavior demonstrated she had "significant experience in this area."

Based on the police reports, Grosso testified that in 1975 and 1976 there were nine other victims, including Gordon's daughter S.G. and son D.G. Seven victims were girls between the ages of 11 and 14, S.G. was two years old, and D.G. was nine or 10 years old.

Gordon had been convicted of two counts of violating Penal Code section 288, subdivision (a), found to be an MDSO, and placed in Patton State Hospital for 26 months. Grosso related that a report from Patton State Hospital stated Gordon had made some progress in treatment but "had little insight into his problems." The consensus of hospital staff was that Gordon "remained a risk for recidivist behavior if released to the community." Nonetheless, Gordon was released on community supervision.

Grosso also testified about Gordon's qualifying offenses from 1982. Based on police arrest and investigation reports, Grosso testified Gordon committed sexual offenses against eight girls, ranging in age from 7 to 15. Gordon's grooming pattern began with gifts, movies, or camping trips which, over time, led to physical contact and sexual contact. Gordon was patient in the grooming and development of his victims. Grosso testified this behavior suggested a calculated effort to satisfy his need for sexual contact with underage children.

Gordon took photographs of his victims over the years. The photographs involved bathing suits, nudity, sexually provocative poses, and, ultimately, photographs of the victims engaged in sexual activity with Gordon. The drugstore where Gordon had the photographs developed reported him to the police. During the subsequent investigation, police officers confiscated the photographs and discovered a 15-year-old runaway girl in Gordon's apartment.

Grosso testified about Gordon's qualifying offenses from 1992. Based on police arrest and investigation reports, Grosso testified that in 1992, T.L., who was then

10 years old, reported "sexual behavior toward her from Mr. Gordon had occurred over the last two years." Sometimes the activity hurt T.L. and "made her feel funny." She felt as though Gordon thought she was his wife because "he did things to her that he should have done with a wife."

Grosso concluded that Gordon had demonstrated "ongoing behavior with a prepubescent child and it has a strange mix of boundary disturbances and difficulty in discerning between child and adult behaviors and adult relationships." The qualifying offenses from 1975, 1982, and 1992 demonstrated Gordon had "difficulty with boundaries, . . . difficulty in discerning adult relationships versus relationships with children, . . . difficulty in understanding appropriate behavior and consequently the ability to restrain or reduce or control that behavior." That Gordon continued in this behavior, even after being punished for it, was an indication he would continue such behavior in the future. While at Patton State Hospital, Gordon had reached "a maximum benefit" of treatment yet reoffended after his release.

During their interviews, Grosso and Gordon discussed Gordon's family, relationship history, developmental history, employment, support system, treatment, and past hospitalizations. Gordon described his four marriages as "kind of messed up" and "expressed . . . that sometimes the frustration with adult relationships sort of pave the way for child relationships." Gordon has had no contact with his ex-wives and has no friends outside of the hospital. He has five children and recently had contacted C.G. and D.G. Gordon told Grosso that he began masturbating at age 11 or 12 and became "obsessed" with it into adulthood even after having sexual contact with others. He continues to look at adult pornography (he denied watching child pornography) and masturbate, although with less frequency than when he was younger.

When Grosso asked Gordon about his sexual conduct toward C.G. and D.G., Gordon said, "[t]he issues of his sexual[ly] offending with his biological children hasn't particularly been addressed." Gordon admitted he sexually molested his son D.G.

over a period of two to three years while the child was six to eight years old. Gordon denied any other sexual contact with males. Gordon admitted molesting three or four prepubescent children and 10 pubescent or post-pubescent children aged 7 to 14. He denied committing any "penetrative sex."

Grosso had read Gordon's release plan, in which Gordon stated: "I engaged in . . . fondling, oral copulation, masturbation and intercourse, showering together and I took pictures of the girls in sexually explicit scenes with each other. Some of my offenses lasted for a period of up to six years." Grosso questioned Gordon about the statement that he had engaged in intercourse because it was inconsistent with his denial of having engaged in penetrative sex. Grosso believed that Gordon's convoluted answer reflected that Gordon had not "fully internalized his treatment program," was in denial, and would not or could not understand his condition.

Indeed, Grosso believed that Gordon lacked any meaningful insight into his condition. Gordon justified his behavior by saying "everybody did it" and "it was the job of a father" to teach children about sexual life. Gordon said that if he were released, his plan was simply to stay away from children and tell himself "no" if he felt pedophilic urges. Although Gordon currently was cooperative in participating in treatment, he had been cooperative in treatment while at Patton State Hospital too. Grosso believed that Gordon participated in sex offender treatment on a superficial level and did not have a meaningful understanding of his "complex and chronic condition."

Gordon's release plan included moving to Utah to live with a brother and participate in outpatient treatment at a local facility. Gordon listed his two brothers, an aunt, and C.G. as his family support group. Grosso believed that Gordon was not stable enough for outpatient treatment and did not believe it was appropriate for a victim to be part of his family support group.

Although Gordon has some serious health problems and was 76 years old, Grosso believed Gordon could function on a daily basis with reasonable mobility and had

no health problem that would prevent him from reoffending if he was released from confinement. Grosso explained: "Mr. Gordon indicated to me that he masturbates to . . . pornography. He is able to have an erection. . . . [¶] His history of molestation is oral copulation. There's nothing wrong with his tongue or his lips. His past behaviors included digital penetration. There's nothing wrong with his fingers plus he is able to walk and to get to and from where he needs to go."

Grosso concluded Gordon suffers from pedophilic disorder, sexually attracted to males and females, nonexclusive. Pedophilic disorder is a lifelong condition and is a "mental disorder" under section 6600.

Grosso also concluded that Gordon, notwithstanding his age, would likely engage in future sexually violent behavior due to his pedophilic disorder. Grosso administered two tests to reach that conclusion. The first was the Static-99R, which is a risk assessment actuarial tool designed to aid in the prediction of recidivism for sexual offenders based on static (immutable) factors. Gordon scored two on the Static-99R. That score is what an average sex offender would receive, but, Grosso explained, Gordon is an "outlier" due to the late age at which he continued to offend and other factors the Static-99R does not account for. The second test was the Stable 2007, which measures dynamic (changeable) factors. On the Stable 2007, Gordon scored 15, which placed him in the high risk category. That score, with a Static-99R score of two, meant that Gordon had an 11.3 percent risk of reoffending within five years and a 19.1 percent risk of reoffending within 10 years.

B. *Longwell's Testimony*

Longwell is a psychologist and licensed marriage and family therapist. She has conducted between 2,500 and 3,000 sexually violent predator evaluations for the DSH. She concluded that Gordon is a sexually violent predator within the meaning of the SVPA.

Longwell was hired by the district attorney's office to evaluate Gordon. She reviewed over 10,000 pages of records she had received from the district attorney's office and interviewed Gordon for three hours and 20 minutes. Gordon provided Longwell with portions of his hospital treatment plan from March 2015, a list of psychologists who facilitated his sex offender treatment program, a letter from the office administrator of a sex offender treatment program in Utah, two other letters, and his relapse prevention plan.

Longwell determined that Gordon had 11 qualifying offenses, all for violating Penal Code section 288, subdivision (a). She considered the number and ages of the victims, the nature of Gordon's sexual molestation of them, and the fact three victims were Gordon's children. Gordon admitted to Longwell he committed those offenses. He could not remember everything clearly because it was so long ago.

Longwell testified that Gordon told her: "His marriages weren't going that well . . . he kept trying to stop himself, he was thinking about stopping himself. He knew that it was illegal, that he could get into a lot of trouble with this. And the more he did it, the more chances were that he would get detected, but he said that . . . he would like to make a commitment to himself he was going to stop this and then he just couldn't. He just didn't stop . . . . He said the more he did it, the more sexually stimulated and aroused he got. That his sex drive actually increased, . . . but to his surprise . . . he wasn't getting satiated, he was getting more stimulated by this." Gordon told Longwell that he was "so aroused," and "out of control" that he did not think about getting caught, and was "obsessed with wanting more and more."

Gordon told Longwell that his obsession was such that he masturbated to pictures of naked children and thought about children when he had sex with his wife. Over time, his interest in sex with adult women waned. He liked having sex with little girls instead because it made him feel "good," "big," and "powerful." He did not, however, understand the harm he caused his victims, including C.G., who became a drug

addict. He could not understand that his crimes were violent because he did not use force in a conventional way.

Longwell read Gordon's release plan and discussed it with him. Longwell did not believe the plan, which was to avoid contact with children, was realistic because children were everywhere. He also told Longwell he would place parental controls on his computer. Longwell did not believe that was a realistic way to prevent Gordon from looking at child pornography because those controls can be removed.

Although Gordon had participated in treatment while at Patton State Hospital, Longwell did not believe he was sincere about treatment. Gordon told Longwell that when he went to Patton State Hospital he did not believe he needed treatment and met other child molesters there. He told her that while on probation from the hospital, he and another sex offender went to family nudist camps together and competed to molest children. Longwell considered those comments in determining whether Gordon currently was sincere about treatment and whether he might reoffend.

Longwell reviewed Gordon's medical records. She noted he had serious health problems but, after cardiac bypass surgery and heart valve replacement, his condition had improved. He had lost 30 pounds, no longer took insulin for diabetes, and no longer needed dialysis for kidney failure. Gordon told Longwell that his energy and vitality had greatly improved. Longwell believed that Gordon did not have a physical condition that would prevent him from reoffending.

Longwell diagnosed Gordon as having (1) pedophilic disorder, sexually attracted to both males and females, nonexclusive type and (2) alcohol use disorder moderate in a controlled environment. Both are qualifying mental disorders under the SVPA. Longwell based the pedophilic disorder diagnosis on Gordon's sexual acts with prepubescent children. She diagnosed alcohol use disorder because he had used alcohol to excess, which impaired his emotional and volitional controls.

Longwell administered four "actuarial instruments." Gordon scored a two on the Static-99R, a 3.71 on the SRA-FV, a 25 on the PCL-R, and a five on the Static-2002R. His score on the SRA-FV placed him in the "high risk/high needs range," and his score on the PCL-R placed him in the "high range." As a consequence, Gordon's recidivism rate under the Static-99R was 11.3 percent within five years and 19.1 percent within 10 years. Longwell testified these scores are underestimates because the Static-99R does not take into account undetected offenses.

According to Longwell, the high range on the PCL-R means the subject's capacity for empathy, to learn, and to understand the victim's needs is "not very good." In such cases, expectations from treatment are "limited." Gordon's score of five on the Static-2002R placed him in the moderate range. Longwell testified the Static-2002R underestimates risk because it is only measuring the chances of someone being charged or convicted of a new offense.

In Longwell's opinion, the actuarial instruments underestimated Gordon's risk of reoffending because Gordon is an exceptional sex offender due to his numerous crimes, the length of time they went on, and the speed with which he recidivated. Those aspects are not reflected in the actuarial scores. Longwell concluded Gordon is a severe pedophile and is likely to commit another sexually violent predatory offense if released from confinement. She believed Gordon's postrelease plans are not viable and would not protect the community against any further offenses.

C. *Barbaree's Testimony*

Barbaree is a professor of psychiatry at the University of Toronto. He was retained as an expert by the defense, but did not evaluate Gordon.

Barbaree testified about the relationship between age and recidivism rates for sex offenders, a subject on which he has conducted extensive research. He testified that up until 2000 it was generally believed age had no real effect on recidivism. In 2002, an empirical study by Karl Hanson (who developed the Static-99 test) on the effects of

age on recidivism showed recidivism rates go down linearly with age so that, by age 70, recidivism rates are very near zero for familial child molesters.

Barbaree and a colleague, Ray Blanchard, conducted a study to reassess Hanson's study and found the same linear reduction in recidivism. Barbaree and Blanchard studied 477 men, of whom 37 percent had assaulted adult females, 33 percent had assaulted nonfamilial children, 20 percent had assaulted familial children, and 10 percent had assaulted victims from both age groups. The men were followed for five and one half years after release from custody. They divided the men into four groups according to age: those in their 20's, 30's, 40's, and 50 plus. The men in their 20's recidivated at a rate of 16 percent, those in their 30's at a rate of 11 percent, those in their 40's at a rate of 7 percent, and those 50 and older at a rate of 4 percent. Barbaree testified his study showed a significant linear reduction in recidivism rates in the child molesters, rapists, and incest offender groups "with a common ending at about 0 at age 70."

Barbaree testified his research led in 2012 to a change in the Static-99 assessment to reflect the effects of aging more accurately. The new assessment, the Static-99R, is an improvement in predictability over the Static-99.

Barbaree testified the rate of sexual recidivism mirrors the recidivism rate of other violent crimes. He considered FBI arrest reports showing the arrest rate per 100,000 population for different age categories from 1993 to 2001. The peak for risk of violent crime is in the latter teens, age 17, 18, or 19. Afterwards, there is a slow decrease over age so that by age 65 the rate of arrest for violent crime is essentially zero.

D. *Musacco's Testimony*

Musacco is a licensed psychologist and has conducted over 1,000 sexually violent predator evaluations for the State of California. He was retained by the defense to conduct an evaluation of Gordon. Musacco conducted two evaluations of Gordon, one in June 2014, and the other in June 2015.

As to whether Gordon had committed the qualifying offenses, Musacco testified, "he has more than one qualifying crime" and "we have well more than one victim." As to whether Gordon has a qualifying mental disorder, Musacco testified that Gordon "clearly meets this criteria for pedophilic disorder." Musacco considered Gordon's developmental history, employment history, relationship history, and psychosocial history. Musacco diagnosed Gordon as having pedophilic disorder, sexually attracted to both males and females, nonexclusive: "The pedophilic disorder is pretty much undeniable and that was the diagnosis that I reached."

Musacco concluded, however, Gordon did not pose a serious and well-founded risk of reoffending if he were released from confinement. Musacco assessed Gordon using the Static-99R and gave him a score of two, indicating a reoffense rate of 5.6 percent after five years.

Age was the decisive factor in Musacco's conclusion Gordon did not pose a serious risk of reoffending. Musacco testified: "[I]t is extremely rare, not unheard of but extremely rare for somebody to commit a sexual violent offense in their late 70's. [¶] I have seen it happen a few times, but it's so rare there's not even a lot of research on it. . . . The age is an overwhelmingly protective factor. So [Gordon]'s gone through treatment. He's done a good job, but really the big issue here is age." Musacco testified that another protective factor was that Gordon has less than 15 years left to reoffend "due to age and poor health."

Musacco concluded: "I do not believe that [Gordon] poses a serious and well-founded risk. In no way shape or form am I saying that there is no risk. Of course, the man has been molesting for many, many years and poses a risk, but the age factor strongly suggests that it isn't a serious and well-founded risk."

E. *Owen's Testimony*

Owen, a licensed clinical psychologist, testified he was contracted by the state in connection with this case. Owen evaluated Gordon in 2011 and updated that evaluation in 2014 and again in June 2015.

Owen testified that Gordon has the qualifying sexually violent offenses. Owen identified three such offenses: the 1975 incidents involving C.G., the 1982 incidents involving the "several girls in the neighborhood," and the 1992 incidents involving T.L. Owen diagnosed Gordon with pedophilic disorder with a sexual attraction to females.

Owen reported that, in 2011, Gordon had significant health issues, some of which were life threatening. In 2011, Owen spoke to Doreen Hughes, a psychologist, who reported that Gordon was in sex offender treatment, making good progress, and completing his assignments. He also spoke with Gordon's treatment provider, who told him that Gordon had completed all of his assignments in treatment. Based upon what he had been told, Owen believed that Gordon has completed his treatment program and "has done everything he can in the facility."

Owen assessed Gordon using the Static-99R and gave him a score of two, which placed him in the low to moderate range, indicating a 5.6 percent probability of reoffending. But, in Owen's opinion, "[a]ll of this may be irrelevant because when we get an aged senior citizen like this, the data is less helpful because so few men over the age of 70 ever sexually re-offend. . . . [T]he likelihood of reoffending is so low."

Owen acknowledged that Gordon's case is "troubling" because "there's a lot of sexual deviance in this guy and I have to weigh that out." However, Owen testified the Static-99R already took into consideration Gordon's sexual deviance, and Gordon had completed treatment to address it. In addition, Gordon's age and substantial health problems were protective factors.

In 2011, Owen had concluded that Gordon did not pose a substantial and well-founded risk of reoffending. Owen reached the same conclusion in his 2014 and 2015 evaluations, and it is his current opinion: "Even though [Gordon]'s got the qualifying offenses and the pedophilic disorder, I had to conclude that [Gordon] does not pose a substantial and well-founded level of risk."

Owen emphasized his conclusion was based on Gordon's score on the Static-99R. Owen testified: "Again, the sexual deviance, it's troubling to me, it's definitely there, but his age and his progress in treatment and his health problems, I weigh all of these out. I go back to the Static-99R because that's frankly a much better predictor than I am. That says he's low risk so that's my conclusion in this case. I'm trying to stay close to the science and avoid my gut feelings which tell me he's done some terrible things here, and if I just went with my gut, I'd say, you know, boy, there's a likelihood to re-offend. But if I stay with the science, I say he's not likely to re-offend."

DISCUSSION

I.

Admission of Exhibits

Gordon argues the trial court erred by receiving into evidence exhibits 2 through 12 because they contained inadmissible hearsay. We will assume that defense counsel made all the objections necessary to preserve the claims of error for appeal. Although Gordon identifies this as his second argument, we address it first because our resolution of Gordon's claimed errors in admission of exhibits is a necessary predicate to resolving the issue whether admission of certain case-specific testimony from expert witnesses was error or harmless error.

A. *Relevant Law*

In a commitment proceeding under the SVPA: "Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole

basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the [DSH]." (§ 6600, subd. (a)(3) (section 6600(a)(3)0.)

Section 6600(a)(3) creates a broad hearsay exception for documentary evidence to prove the existence and details underlying the commission of the offenses leading to prior convictions and to the defendant's predatory relationship with the victim. (*People v. Otto* (2001) 26 Cal.4th 200, 208 (*Otto*).) In *Otto*, the California Supreme Court confirmed that section 6600(a)(3), by its terms, "authorizes the use of hearsay in presentence reports to show the details underlying the commission of the predicate offense." (*Otto, supra,* at pp. 206-207.) The court explained that "[b]y permitting the use of presentence reports at the SVP proceeding to show the details of the crime, the Legislature necessarily endorsed the use of multiple-level-hearsay statements that do not otherwise fall into a hearsay exception." (*Id.* at p. 208.) The expansive hearsay exception created by section 6600(a)(3) was "intended to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions" and does not violate due process. (*Otto, supra*, 26 Cal.4th at pp. 203, 208.)

In addition, Penal Code section 969b "allows the admission into evidence of records or certified copies of records 'of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which' the defendant has been imprisoned to prove that a person has been convicted of a crime," including a sexually violent offense. (*People v. Roa* (2017) 11 Cal.App.5th 428, 444 (*Roa*).)

B. *Exhibits 2, 3, 4, 5, 7, and 11*

Exhibits 2, 3, 4, 5, 7, and 11 are law enforcement arrest and investigation reports. Exhibits 2, 3, 4, and 5 are Costa Mesa Police Department crime, arrest, and

investigation reports from September 1975. Exhibit 7 consists of Santa Ana Police Department reports and supplemental reports from March 1982. Exhibit 11 is an Orange County Sheriff's Department report from May 1992. Redacted from all exhibits were references to persons and conduct that did not lead to the qualifying convictions.

Relying on *People v. Burroughs* (2016) 6 Cal.App.5th 378, 410-411 (*Burroughs*), the Attorney General argues the police reports are admissible. In *Burroughs*, the Court of Appeal held that appropriately redacted police reports regarding the qualifying offenses were admissible under section 6600(a)(3). The court rejected the defendant's contention the police reports lacked sufficient reliability to fall with the hearsay exception of section 6600(a)(3). (*Burroughs, supra,* 6 Cal.App.5th at p. 410.) The court reasoned that, because *Otto* authorized the People to prove the details of the defendant's qualifying offenses with probation reports, the sources of those details, such as police reports, likewise are admissible to prove the same information. (*Ibid.*)

Gordon argues the analysis of *Burroughs* is flawed because the *Burroughs* court did not undertake the four-part due process analysis required by *Otto*. He contends police reports do not have sufficient indicia of reliability to be admissible because, while a defendant has the right and ability to review and correct a probation report, "there is no system in place by which a defendant can arrange to have a police report corrected."

We need not address whether *Burroughs* is correct because exhibit 11 was admissible for other reasons and any error in admitting the remaining exhibits was harmless. (See *People v. Bocklett* (2018) 22 Cal.App.5th 879, 890 (*Bocklett*) ["We need not address [*Burroughs*] because, even if the trial court erroneously admitted the police reports, the assumed error was harmless based on the expert testimony that relayed substantially all the conduct stated in the police reports"].) Exhibit 11, the sheriff's department report from May 1992, was admissible because, for the 1992 offenses, Gordon admitted in the plea form that his plea was factually "[b]ased upon the arrest

report and the preliminary hearing—stipulated basis." In addition, T.L. testified at trial about Gordon's conduct.

Admission of exhibits 2, 3, 4, 5, and 7, if erroneous, was harmless because admissible evidence established beyond reasonable doubt that Gordon had committed the offenses charged in 1975 and 1982. The charging documents, plea forms, and abstracts of judgment were admissible and were received into evidence as exhibits 6 and 8. Gordon pleaded guilty to charges he committed lewd and lascivious acts on C.G., a child under the age of 14, and admitted to Grosso that he molested C.G. and D.G. In pleading guilty to the 1982 charges, Gordon stipulated he committed lewd acts with or upon L.P., C.R., T.H., S.H., and S.A., all of whom Gordon admitted were under the age of 14. L.B.'s trial testimony covered some of what was included in exhibit 7.

C. *Exhibits 6, 8, and 12*

Exhibits 6, 8, and 12 are partial court files for the three criminal cases that resulted in Gordon's qualifying offenses. Each exhibit includes the charging document, plea form, and abstract of judgment. These exhibits were admissible under section 6600(a)(3) to prove the facts and circumstances of the underlying offenses.

Gordon agrees that for the most part exhibits 6, 8, and 12 were admissible. He argues, however, that certain portions of those exhibits were inadmissible. Specifically, he argues the portions of exhibit 6 appearing at pages 2334 through 2351 of volume 8 of the clerk's transcript were inadmissible because they refer to the conditions of his probation, proceedings regarding violation of probation, and his status as an MDO. Pages 2334 through 2351 are court records, orders, and minutes, all of which are subject to judicial notice (Evid. Code, § 452, subds. (c) & (d)) and come within the hearsay exception for official records (*id.*, § 1280). Although exhibit 6 was inadmissible to prove the truth of the finding that Gordon was an MDSO, it was admissible to prove the fact that he had been adjudged to be one. (See *People v. Munoz* (2005) 129 Cal.App.4th 421,

430-431 [proper to take judicial notice of prior finding that defendant was a sexually violent predator, but not to take judicial notice of the truth of that finding].)

As for exhibit 8, Gordon contends the 1982 felony information (pages 2353 through 2359 and 2367 of volume 8 of the clerk's transcript) included in that exhibit was inadmissible because it included charges to which he did not plead guilty. As for exhibit 12, Gordon likewise contends the 1992 felony complaint (pages 2373 through 2378 of volume 8 of the clerk's transcript) included in that exhibit was inadmissible because it included charges to which he did not plead nolo contendere.

The SVPA does not prohibit the introduction of evidence of nonqualifying charges or convictions if proven by admissible evidence. The 1982 felony information and the 1992 felony information were admissible for that purpose. Moreover, Gordon's plea form, which was properly admitted, identified the charges to which Gordon pleaded guilty and so the jury could deduce that Gordon had not pleaded guilty or nolo contendere to the other charges.

D. *Exhibits 9 and 10*

Exhibits 9 and 10 are progress notes dated January 23, 2015 (exhibit 9) and March 3, 2015 (exhibit 10) from Coalinga State Hospital. In both exhibits 9 and 10, the treating psychologist reported statements made by Gordon about his past and current relationship with and feelings toward C.G.

Hospital records, if properly authenticated, are admissible under the business records exception to the hearsay rule. (*People v. Landau* (2016) 246 Cal.App.4th 850, 872, fn. 7 (*Landau II*).) "Authentication requires the entries to have been made in the regular course of business, at or near the event and the method and time of preparation tend to indicate the entry's trustworthiness." (*Ibid.*) The Attorney General concedes no foundation was laid for the admission of exhibits 9 and 10. Those exhibits were inadmissible but the error was harmless. Gordon's crimes against C.G. were well-established. Many statements in exhibits 9 and 10 were helpful to Gordon because

they suggested he was attempting to come to terms with his prior behavior and establish a healthy relationship with C.G., whom Gordon identified would be part of his support group on release.

E. *Exhibits 15 and 16*

Exhibits 15 and 16 are certified copies of Gordon's records from the Department of Corrections and Rehabilitation. Exhibit 15 is Gordon's incarceration history from July 1982 through May 1990, the abstract of judgment from July 1982, photographs of Gordon, and his fingerprints. Exhibit 16 is Gordon's incarceration history from January 1993 through April 2004, the abstract of judgment from November 1992, photographs of Gordon, and his fingerprints.

Exhibits 15 and 16 were admissible to prove Gordon's qualifying offenses. (§ 6600(a)(3); Pen. Code, § 969b.) Other information in the exhibits was, Gordon acknowledges, "irrelevant" and "not particularly significant."

II.

Admission of Case-Specific Expert Testimony (*Sanchez* Error)

In his opening brief, Gordon identifies 12 instances in which, he contends, Grosso testified to case-specific hearsay statements made inadmissible by *Sanchez, supra,* 63 Cal.4th 665. Gordon identifies seven such instances in Longwell's testimony, four such instances in Musacco's (cross-examination) testimony, and four such instances in Owen's (cross-examination) testimony.[3] The Attorney General agrees in a few

[3] In most instances, defense counsel did not pose a hearsay objection to the challenged testimony. *Sanchez, supra,* 63 Cal.4th 665 was issued after the trial in this matter and made a change in California law. (*In re Rueda* (2018) 23 Cal.App.5th 777, 795-797.) Because any hearsay objection to case-specific expert witness testimony would have been futile under California Supreme Court precedent at the time of trial, Gordon did not forfeit his claims of *Sanchez* error. (*People v. Veamatahau* (2018) 24 Cal.App.5th 68, 72, fn. 7.)

instances the challenged testimony was inadmissible but argues in most other instances the case-specific hearsay testimony was proven by independent and admissible evidence.

A. *The* Sanchez *Opinion*

Two months after this matter was tried, the California Supreme Court issued its decision in *Sanchez*, holding: (1) An expert witness may not relate as true case-specific facts asserted in hearsay statements unless they are independently proven and (2) if a prosecution expert witness seeks to relate testimonial hearsay, there is a violation of the confrontation clause of the Sixth Amendment to the United States Constitution unless there is a showing of unavailability, the defendant had a prior opportunity for cross-examination, or the defendant forfeited that right by wrongdoing. (*Sanchez, supra*, 63 Cal.4th at p. 686.)

The California Supreme Court confirmed that an expert may rely on hearsay in forming an opinion but concluded an expert may not relate case-specific facts asserted in hearsay statements "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.) An expert may "testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Id.* at p. 676.) The court in *Sanchez* explained that case-specific facts are those of which the expert has no independent knowledge and relate "to the particular events and participants alleged to have been involved in the case being tried." (*Ibid*.) The expert may render an opinion based on case-specific facts but may not relate such facts unless they are within the expert's personal knowledge. (*Ibid.*)

The *Sanchez* court considered the permissible scope of expert testimony and adopted this rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution

expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686, fn. omitted.)

"Although *Sanchez* was a criminal case, the court stated its intention to 'clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony,' generally." (*Burroughs, supra*, 6 Cal.App.5th at p. 405, fn. 6.) Thus, *Sanchez* has been held to apply to cases arising under the SVPA. (*Yates, supra,* 25 Cal.App.5th at p. 483; *Bocklett, supra,* 22 Cal.App.5th at p. 890; *Roa, supra,* 11 Cal.App.5th at p. 443, *Burroughs, supra,* 6 Cal.App.5th at p. 403.)

B. *Prejudice Standard*

We assess prejudice resulting from the admission of expert testimony in violation of *Sanchez* under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Flint* (2018) 22 Cal.App.5th 983, 1003-1004 (*Flint*); *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 510; *Roa, supra*, 11 Cal.App.5th at p. 455.) The *Watson* standard applies "even where the expert's testimony included multiple statements that were inadmissible under *Sanchez*." (*Flint, supra,* at p. 1004.) Under the *Watson* standard, reversal is required only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.)

What is the outcome if expert witness testimony, inadmissible under *Sanchez*, is supported by other evidence that is independently admissible or falls within a hearsay exception? Gordon argues that such case-specific testimony is inadmissible under *Sanchez* even if independently admissible evidence supports the testimony. Two cases seem to support Gordon's position. (See *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 413 ["testimony about case-specific facts of which [the expert] does *not* have personal knowledge is inadmissible, even if specific facts are independently proven

by other evidence"]; *People v. Stamps* (2016) 3 Cal.App.5th 988, 996 ["If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it"].) Several other opinions conclude an expert may testify about case-specific facts that are proven independently or come within a hearsay exception. (*People v. Jeffrey G., supra*, 13 Cal.App.5th at p. 510 ["If prior unobjected testimony supported the prosecution experts' case-specific testimony," then "the testimony [is] not objectionable under *Sanchez*"]; *Roa, supra*, 11 Cal.App.5th at p. 450 ["The limitation on expert testimony imposed by the Supreme Court in *Sanchez* applies to case-specific facts that are not independently proven or covered by a hearsay exception"]; *Burroughs, supra*, 6 Cal.App.5th at p. 407 ["Under *Sanchez*, admission of expert testimony about case-specific facts was error—unless the documentary evidence the experts relied upon was independently admissible"].)

In *Flint, supra*, 22 Cal.App.5th at page 998 the Court of Appeal faced the issue in an SVPA commitment case whether case-specific statements are inadmissible under *Sanchez* when other evidence, such as witness testimony, independently proves those case-specific facts. The court explained that *Sanchez* could be read either way on that issue. The statement in *Sanchez* that an expert cannot "'relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence* or are covered by a hearsay exception'" suggests an expert might be permitted to relate case-specific facts contained in out-of-court statements if those facts are "'independently proven by competent evidence.'" (*Flint, supra*, 22 Cal.App.5th at pp. 998-999.) Yet, the statement in *Sanchez* that "'[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay'" suggests the opposite. (*Flint, supra*, at p. 999.) The Court of Appeal then surveyed recent opinions, which we cite above and which appear to be in conflict. (*Flint, supra*, 22 Cal.App.5th at

p. 999.) The Court of Appeal believed the opinions were "only superficially in tension with one another" and concluded: "The correct analysis, in our view, boils down to harmless error. It seems to us that even if the admission of expert testimony reciting as true case-specific hearsay that was independently proven through other witnesses technically constituted error, at most such error would be harmless on this record." (*Id.* at p. 1000.)

We shall use this harmless error analysis though, we note, the result would be the same if admission of case-specific expert testimony is not *Sanchez* error when the testimony is supported by independently admissible evidence.

C. *Specific* Sanchez *Objections*

We address each of Gordon's claims of *Sanchez* error by each expert witness.

1. *Grosso*:

(1) Testimony regarding Gordon's criminal record, including both qualifying and nonqualifying offenses and testimony relating information and details about those offenses and related charges.

Grosso's testimony was independently proven by competent evidence. Exhibit 6 includes the felony complaint, guilty plea, court minutes, and abstract of judgment for the 1975 charges; Exhibit 8 includes the felony complaint, guilty plea, and abstract of judgment for the 1982 charges. On the plea form, as the factual basis for his plea, Gordon wrote that he committed lewd acts with or upon L.P., C.R., T.H., S.H., and S.A., all of whom Gordon admitted were under the age of 14. Exhibit 15 also includes the abstract of judgment from July 1982 covering the 1982 convictions, and exhibit 12 includes the information, felony complaint, plea from and abstract of judgment for the 1992 charges. On that plea form, as the factual basis for the plea, Gordon wrote, "[b]ased upon the arrest report and the preliminary hearing—stipulated basis."

The trial testimony of L.B. and T.L. also supplied independent competent evidence. Further, Gordon admitted to Grosso that Gordon had molested his daughter

C.G. and his son D.G. and admitted molesting three or four prepubescent children and 10 pubescent or post-pubescent children aged seven to 14. Gordon made similar admissions to Longwell. Gordon's admissions fell within the hearsay exception for statements made by a party and therefore were admissible under Evidence Code section 1220. (*Yates, supra*, 25 Cal.App.5th at p. 485; *Flint, supra*, 22 Cal.App.5th at pp. 1000-1001.)

(2) Testimony that Gordon had been found to be an MDSO.

This testimony was independently proven by exhibit 6, which includes the trial court minute order dated October 27, 1975 finding Gordon to be an MDSO and ordering him committed to Patton State Hospital. We have concluded the minute order is admissible.

(3) Testimony about Gordon's behavior while at Patton State Hospital and Gordon's participation and progress in treatment there.

Grosso testified he had reviewed records from Patton State Hospital reporting that Gordon had taken an active part in group therapy and appeared to "intellectually understand the seriousness of his offenses," but that the consensus of hospital staff was that Gordon remained "a risk for recidivist behavior if released." The Attorney General concedes this testimony was inadmissible because it came from hospital records that were not admitted into evidence. (See *Roa, supra*, 11 Cal.App.5th at p. 452.) The error was harmless in light of evidence of (1) Gordon's statements to Longwell that he was not sincere about treatment at Patton State Hospital and (2) the qualifying offenses. And, the overwhelming evidence that Gordon did reoffend after release from Patton State Hospital established he indeed was a risk for recidivist behavior.

(4) Testimony about Gordon's release from confinement at Patton State Hospital.

This testimony was independently proven by exhibit 6, which includes the minute order from December 12, 1977 terminating MDSO proceedings, reinstituting

criminal proceedings, suspending sentence, and granting probation. We have concluded the minute order is admissible.

(5) Testimony that Gordon was paroled in 1987 and his parole was revoked based on reoffending in 1992.

Error in permitting this case-specific testimony was harmless. Exhibit 15, records from the Department of Corrections, show that Gordon was paroled in 1987. Exhibit 12 includes the information and felony complaint filed against Gordon in 1992, the order remanding Gordon to the custody of sheriff, the plea form, and the abstract of judgment.

(6) Testimony of statements Gordon allegedly made to police that he had been treated at Patton State Hospital and had a father/daughter relationship with the 1982 victims.

Grosso's testimony on this point is inadmissible case-specific hearsay. The error was harmless in light of evidence showing that Gordon had been treated at Patton State Hospital and evidence establishing the 1982 offenses, including the testimony of L.B.

(7) Testimony about the contents of DSH records.

Grosso testified about statements that Gordon made in 2015 to a treating doctor at Coalinga State Hospital. The statements were memorialized in hospital records. Grosso's testimony is inadmissible case-specific hearsay. (*Yates, supra*, 25 Cal.App.5th at p. 485.) We have concluded that exhibits 9 and 10 were inadmissible; therefore, Grosso's testimony about the contents of those exhibits was inadmissible. (See *People v. Roa, supra*, 11 Cal.App.5th at p. 452; *Landau II, supra*, 246 Cal.App.4th at pp. 876-877.) The error was harmless because proof of Gordon's relationship with C.G. (the subject of the challenged testimony) came from other sources too. In light of overwhelming evidence of Gordon's qualifying offenses and mental disorders, it is not reasonably

probable the jury would have reached a result more favorable to Gordon without Grosso's testimony about the DSH records.

(8) Testimony about T.L.'s statement that Gordon thought of T.L. as his wife.

Grosso's testimony is inadmissible case-specific hearsay. The error was harmless in light of T.L.'s statements in a police report admitted into evidence as exhibit 11 which, we have concluded, was admissible, and in light of the evidence, including T.L.'s trial testimony, of Gordon's crimes against her.

(9) Testimony of Gordon's use of jewelry to entice children.

Grosso's testimony that Gordon had used jewelry to entice children is inadmissible case-specific hearsay. The Attorney General concedes this point and concedes the police reports do not include specific reference to Gordon's use of jewelry. The error was harmless because the issue of jewelry was a minor point and there was overwhelming evidence of Gordon's sexual abuse of children.

(10) Testimony that Gordon has several medical issues, including heart and kidney failure, diabetes, hypertension, and asthma.

Grosso testified Gordon's medical issues were "either brought up by Mr. Gordon or otherwise brought forth in records." Grosso's testimony was admissible to the extent it was based on Gordon's statements made to him. (*Yates, supra*¸ 25 Cal.App.5th at p. 485.) Otherwise, the error was harmless because, if anything, evidence of Gordon's poor health would support the claim that Gordon likely would not reoffend if released from confinement.

(11) In describing Gordon's Static-99R score, Grosso testified to inadmissible case-specific hearsay.

Gordon argues that in describing his score on the Static-99R, Grosso testified to large amounts of case-specific hearsay about Gordon's criminal and sexual history. As the Attorney General points out, although the challenged testimony runs to

16 pages of the reporter's transcript, Gordon does not identify specifically which parts he contends violated *Sanchez*. Nonetheless, we have reviewed the entirety of the testimony and conclude every instance of case-specific hearsay was independently proven, with two exceptions. First, Grosso mentioned that Gordon had been convicted of petty theft in 1960 when he was 21 years old. Second, Grosso testified that Gordon violated his parole in 2002 by possessing a CD with "some sexual cartoon content." Neither of those bits of testimony was prejudicial in light of the overwhelming evidence that Gordon sexually molested children and had violated parole.

(12) Testimony about the proposed treatment center in Utah.

Grosso testified that, during his interview with Gordon, Gordon had said that upon release he planned to attend an outpatient program at a sex offender treatment facility in Utah. Gordon's statements fell within the hearsay exception for statements made by a party and therefore were admissible under Evidence Code section 1220. (*Yates, supra*, 25 Cal.App.5th at p. 485; *Flint, supra*, 22 Cal.App.5th at pp. 1000-1001.) Grosso also testified that the treatment facility in Utah did not treat sex offenders but treated only those who had been sexually abused. This is background information permissible under *Sanchez*.

2. *Longwell*:

(1) Testimony about the existence and circumstances of Gordon's qualifying offenses.

As discussed above, the existence and circumstances of Gordon's qualifying offenses were proven with independent admissible evidence.

(2) Testimony that Gordon had been found to be an MDSO and had been committed to Patton State Hospital.

As discussed above, exhibit 6 includes the trial court minute order dated October 27, 1975 finding Gordon to be an MDSO and ordering him committed to Patton State Hospital.

(3) Testimony about nonqualifying offenses.

Gordon contends that Longwell testified his "records contained information that there were other victims that did not result in qualifying convictions." We find no error. Longwell testified that she had spoken with Gordon about other offenses, and he told her "he was involved. He did those things. He was frank and admit[ed] to it." Longwell testified: "Mr. Gordon has said that . . . there were other victims, and he said it was really hard for him to remember everybody, but there were other victims male, children and he had told other evaluators and so it was in his record that there were other victims." Longwell also testified that Gordon "talked about" another victim. Gordon's statements to Longwell fell within the hearsay exception for statements made by a party and therefore were admissible under Evidence Code section 1220. (*Yates, supra*, 25 Cal.App.5th at p. 485; *Flint, supra*, 22 Cal.App.5th at p. 1000.)

(4) Testimony about contents of DSH treatment records.

Gordon argues Longwell testified to the contents of treatment records "which she characterized as demonstrating that he lacks empathy." The Attorney General agrees Longwell's testimony on this point was inadmissible case-specific hearsay because the hospital records were not admitted into evidence. (See *Roa, supra*, 11 Cal.App.5th at p. 452; *Landau II, supra*, 246 Cal.App.4th at pp. 876-877.) But Gordon did not object to this testimony, which was inadmissible under pre-*Sanchez* case law. (See *Landau II, supra*, at pp. 876-877.) Any error was harmless in light of the overwhelming evidence that Gordon had the required qualifying offenses and mental disorder. Also, Gordon scored in the high range on the PCL-R, which, Longwell testified, means the subject's capacity for empathy, to learn, and to understand the victim's needs is "not very good."

(5) Testimony about the contents of Gordon's medical records and his health status.

Longwell testified she reviewed Gordon's medical records and talked to Gordon about his "current physical medical status." Longwell testified Gordon has serious health problems but his health had improved after having cardiac bypass surgery and heart valve replacement. Before the surgery, Gordon had Type II diabetes, was on dialysis for kidney failure, and was always short of breath. After the surgery, Gordon lost 30 pounds, no longer took medication for diabetes, no longer needs dialysis, and "his vitality has greatly improved." Gordon did not object to any of this testimony. It is not clear whether Longwell's testimony was based on medical records or statements made by Gordon. An objection might have helped to clarify the matter. Under pre-*Sanchez* law, Longwell could not testify to contents of medical records. (*Landau II*, *supra*, 246 Cal.App.4th at pp. 850, 876-877.)

Any error was harmless because: (1) Longwell's impression of Gordon also was based on observing him during the interview; (2) Grosso observed Gordon and testified he could walk and could complete all activities asked of him; (3) Musacco testified that Gordon suffers from gout, high cholesterol, arthritis, kidney failure, emphysema, and diabetes (although he no longer takes medication for diabetes); and (4) Musacco testified that Gordon had cardiac bypass surgery but nonetheless had a number of serious medical conditions.

(6) Testimony that Gordon had not been in the community for five years or more without reoffending.

Longwell testified that Gordon "had not been in the community since his last sex offense for a period of five or more consecutive years." This testimony was independently proven with evidence of Gordon's criminal record, which established the length of the intervals between his offenses.

(7) Testimony that Gordon had used jewelry to entice children.

Longwell testified that she was "aware" that Gordon had used jewelry to entice child victims. The Attorney General concedes this testimony was case-specific

hearsay and "was not based on any admitted or admissible evidence." The error was harmless because the issue of jewelry was a minor point and there was overwhelming evidence of Gordon's sexual abuse of children.

3. *Musacco Cross-examination*:

(1) Testimony about nonqualifying offenses.

Musacco testified that Gordon had a number of victims in the 1960's, including a son, stepson, and daughter. This testimony is case-specific hearsay, but its admission was harmless. Gordon told both Grosso and Longwell that he had many other victims and had molested his son. Musacco agreed that Gordon had the qualifying offenses and has the requisite diagnosed mental disorder—"the issue of pedophilia . . . was really a nonissue. He's had enough victims over the . . . years."

(2) Testimony about the number of Gordon's victims.

Musacco testified that Gordon had about six victims in the 1960's and 1970's and total of about 20 victims in his entire offense history. Musacco's cross-examination testimony on this point appears to be case-specific hearsay. The error was harmless because: (1) there was a large quantity of independent admissible evidence proving Gordon's offenses and the number of victims, (2) Gordon made statements to Grosso and Longwell about the number of victims, and (3) Musacco testified that Gordon had the qualifying convictions and the requisite diagnosed mental disorder.

(3) Contents of a document relating to Gordon's health in the 1970's.

Musacco testified that, based on his review of medical records, Gordon suffered from gout, hyperthyroidism, and obesity in the 1970's. The records themselves were not admitted into evidence. The Attorney General agrees that Musacco's testimony on this point is inadmissible case-specific hearsay.

The error was harmless. The apparent purpose of eliciting that testimony was that Gordon could offend in the 1970's while suffering those conditions and therefore could reoffend with his present health conditions. Gordon's health conditions

since 2002 (when the SVPA petition was filed) were kidney failure, hypertension, high cholesterol, arthritis, heart problems, prostate issues, and gout. Except for gout, these are different conditions than those suffered by Gordon in the 1970's. In addition, by the time of trial, Gordon was some 40 years older than he had been in the 1970's. Musacco testified that Gordon was 76 years old and had serious health problems.

(4) Testimony about Gordon's health issues over the years.

The prosecutor asked Musacco a series of questions regarding whether Gordon's current health conditions would impair Gordon's ability to molest children. Musacco answered no to each question and testified that Gordon was healthier after his heart surgery. While technically case-specific hearsay, the testimony was admissible because defense counsel on direct examination had asked Musacco about Gordon's health problems. Musacco testified that Gordon suffered from diabetes, high blood pressure, gout, high cholesterol, arthritis, kidney failure, and emphysema and had undergone cardiac bypass surgery. Musacco concluded: "Mr. Gordon is a 76-year-old man who has a number of medical conditions that have been serious. In between my first and second interviews he did undergo a cardiac bypass procedure. [¶] He was hospitalized. He suffered . . . severe renal failure. He was on dialysis. He recovered from that. However, he's still a 76-year-old man with emphysema, gout, high blood pressure. He has, like many folks as they get older, his medical condition has declined with age."

4. *Owen Cross-examination*:

(1) Testimony about Gordon's abuse of T.L. and focus on girls.

On cross-examination, Owen testified that a lock of hair in a plastic baggie was found at Gordon's home. Owen testified the hair might be considered a "trophy" but the characterization did not matter because "we know this man has had lots of sexual contact with girls and that he has been totally focused on girls."

The testimony about the lock of hair was case-specific hearsay but not prejudicial. Owen testified the lock of hair did not matter because it was a minor point in a sea of evidence establishing that Gordon met the first two sexually violent predator criteria. Owen's testimony that Gordon had lots of sexual contact with girls and was focused on girls was independently proven by evidence of Gordon's criminal history, the testimony of L.B. and T.L., and testimony of statements Gordon made to Grosso and Longwell.

(2) Testimony about Gordon's victim blaming.

On cross-examination, Owen testified that Gordon had claimed that many of his victims were "promiscuous" and one had "seduced him." Those statements were made to the police and were included in a probation report that Owen had reviewed. The probation report was admissible under section 6600(a)(3) but was never received in evidence. The Attorney General agrees this passage of Owen's cross-examination testimony was inadmissible. The error was harmless in light of the overwhelming evidence that Gordon met the first two sexually violent predator criteria.

(3) Testimony that Gordon had been found to be an MDSO in the 1970's.

On cross-examination, Owen testified that Gordon had been found to be an MDSO and had spent 18 to 24 months at Patton State Hospital. Competent, independently admissible evidence proved this fact.

III.

Cumulative Error

Gordon asserts cumulative error. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable probability' that the jury would have reached a result more favorable to defendant absent a combination of errors." (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216.) Because

a claim of cumulative error is in essence a due process claim, the question ultimately is whether the defendant received due process and a fair trial. (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.)

There was no reasonable probability the jury would have reached a decision more favorable to Gordon absent the combination of evidentiary errors we have identified. At trial, the People had to prove three things: (1) Gordon had suffered a conviction for at least one qualifying offense, (2) Gordon has a diagnosed mental disorder making him a danger to others, and (3) Gordon's mental disorder makes it likely he would engage in future predatory acts of sexually violent behavior.

Most instances of evidentiary error related to the first two issues. The admissible evidence on those issues was overwhelming. Musacco and Owen, Gordon's own experts, concluded that Gordon had the qualifying offenses and a mental disorder (pedophilic disorder) that made him a danger to others. Musacco testified Gordon's pedophilic disorder "is pretty much undeniable" and Owen testified the sexual deviance is "definitely there." Gordon's history of offending and reoffending soon after release from prison or state hospital treatment was well documented and not in any question. Gordon related to Grosso and Longwell instances of nonqualifying offenses, such as Gordon molesting his own son, and of his many victims.

Indeed, Gordon never really contested that he had suffered the qualifying convictions and had the requisite mental disorder. The focus of trial, and the basis of Gordon's defense, was whether Gordon's age and health problems meant he no longer posed a serious threat of reoffending. Although some inadmissible testimony related to this issue, much of it (such as testimony from Musacco and Owen during their respective cross-examinations) related to Gordon's health issues and was helpful to Gordon because it supported his defense that he was too old and too ill to reoffend. Gordon had a full and fair opportunity to present evidence on that point. Barbaree testified about the relationship between age and recidivism, and both Musacco and Owen testified that

Gordon, due to age and health, posed no well-founded risk of reoffending. Grosso and Longwell reached the opposite conclusion, and the jury, as was its prerogative, chose to accept their testimony over that of Barbaree, Musacco, and Owen. The jury would not have come out differently in the absence of the cumulative evidentiary errors, nearly all of which were unrelated to whether Gordon posed a serious risk of reoffending. Gordon received due process and a fair trial.

IV.

Mental Health Expert Retained by the District Attorney

Gordon argues the SVPA does not permit a district attorney to retain his or her own mental health experts (in this case, Grosso and Longwell) to testify at trial but limits a district attorney to using the evaluators appointed under section 6601, subdivisions (c), (d), (e), and (f).

The California Supreme Court, in *Smith, supra*, 6 Cal.5th at page 462, concluded that a sexually violent predator's mental health records may be provided to the district attorney and to a mental health expert retained by the district attorney. The Supreme Court did not grant review to consider, and did not expressly address, the issue whether the district attorney may even retain a mental health expert. For those reasons, Gordon argues it would "be a mistake" to infer the Supreme Court addressed that issue in *Smith.* But limiting *Smith* in that manner would make no sense: The entire *Smith* opinion would be an exercise in futility and complete dictum if the Supreme Court did not at least implicitly conclude a district attorney may retain his or her own mental health expert.

Nonetheless, we address the issue and Gordon's arguments and conclude the district attorney does indeed have right to retain his or her own mental health expert. "'[T]he Civil Discovery Act applies to SVPA proceedings.'" (*People v. Landau* (2013) 214 Cal.App.4th 1, 25 (*Landau I*); *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1368.)

The Civil Discovery Act permits a party to retain and designate "expert trial witnesses." (Code Civ. Proc., §§ 2034.210-2034.290.)

Gordon argues the specific provisions of the SVPA prevail over the general provisions of the Civil Discovery Act. The principle that more specific statutory provisions take precedence over more general ones governs when statutes are in conflict and the conflict cannot be reconciled. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634.) The provisions in the Civil Discovery Act for retention and designation of expert witnesses are not in conflict with the SVPA, which is silent on that matter.

The SVPA does allow for updated evaluations, but that does not mean the district attorney is bound by the updated evaluations and cannot retain his or her own experts to rebut them. "[T]he updated evaluations' primary purpose is evidentiary or informational. [Citation.] Mandatory dismissal is not required where one or both of the later evaluators conclude the individual does not meet the criteria for commitment." (*People v. Reilly, supra*, 57 Cal.4th at p. 648.) Because the updated evaluations are primarily evidentiary or informational, the district attorney should not be compelled to accept them but should be able, if desired, to retain experts in response. If the district attorney is not permitted to retain experts, then updated evaluations favorable to the defendant could become dispositive rather than evidentiary or informational.

In support of his argument that specific provisions of the SVPA prevail over the general provisions of the Civil Discovery Act, Gordon cites *Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677 (*Bagration*). In *Bagration*, the Court of Appeal concluded Code of Civil Procedure section 437c, governing summary judgment, did not apply to SVPA proceedings. (*Bagration, supra*, at pp. 1685-1686.) The court reasoned that Part 2 of the Code of Civil Procedure (which includes section 437c) is not expressly applicable to special proceedings other than the special proceedings in Part 3, Title 1 (Writs of Review, Mandamus, and Prohibition). (*Bagration, supra,* at p. 1685.) In contrast, the court pointed out the Civil Discovery Act, though also within Part 2 of the

Code of Civil Procedure, did apply to SVPA proceedings because the Civil Discovery Act expressly applies to "a civil action and a special proceeding of a civil nature." (*Bagration, supra*, at p. 1686, quoting Code Civ. Proc., § 2016, subd. (b)(1).) Thus, "the Legislature was deemed to have enacted the SVP Act with knowledge of the existing statutes, and the SVP Act contained no indication that the Legislature intended to exempt the Act from the Civil Discovery Act." (*Bagration, supra*, 110 Cal.App.4th at p. 1686.)

The *Bagration* court also concluded Code of Civil Procedure section 437c does not apply to SVPA proceedings because the summary procedures of section 437c are "inherently inconsistent" with the SVPA's requirements that a person must be adjudicated a sexually violent predator beyond a reasonable doubt by a unanimous jury. (*Bagration, supra*, 110 Cal.App.4th at pp. 1688-1689.) "It is evident that, unlike reciprocal Civil Discovery Act procedures, Code of Civil Procedure section 437c could not be incorporated in the SVP Act proceedings without a material alteration. Accordingly, the Legislature could not have intended its inclusion." (*Id.* at p. 1689.)

Gordon asserts that *Bagration*, though not completely on point, supports the proposition that not all provisions of the Code of Civil Procedure apply to proceedings under the SVPA. While *Bagration* does hold that Code of Civil Procedure section 437c is inapplicable to SVPA proceedings, its reasoning supports the conclusion the expert witness retention provisions of the Civil Discovery Act do. As *Bagration* recognized, the Legislature had knowledge of the Civil Discovery Act when it enacted the SVPA, and such knowledge would include the expert witness provisions. Nothing in the SVPA indicates the Legislature intended to exempt the SVPA from the expert witness provisions of the Civil Discovery Act, and the provisions for retention and designation of expert witnesses are not inherently inconsistent with any requirements of the SVPA. The expert witness provisions of the Civil Discovery Act do not alter the reasonable doubt or unanimous verdict requirements, or any other requirement, of the SVPA.

V.

Disclosure of Mental Health Records to the District Attorney's Retained Expert

Gordon argues neither the SVPA nor section 5328 permits a district attorney to disclose a sexually violent predator's mental health records to the district attorney's retained mental health expert. The Supreme Court in *Smith* rejected that argument and concluded: "[A] recent amendment to the SVPA, enacted after we granted review, allows the district attorney to obtain those otherwise confidential records. The district attorney may then disclose those records to its retained expert, subject to an appropriate protective order, to assist in the cross-examination of the DSH evaluators or mental health professionals retained by the defense and, more generally, in prosecuting the SVP petition." (*Smith, supra,* 6 Cal.5th at p. 462.)

The recently enacted amendment referred to by the Supreme Court is section 6603(j)(1),[4] which became effective on January 1, 2016. The Supreme Court held that section 6603(j)(1) applies to all pending sexually violent predator proceedings and therefore covers mental health records from before effective date. (*Smith, supra,* 6 Cal.5th at p. 465.)

VI.

Disclosure of Hypothetical to the District Attorney's Retained Expert

Gordon argues the district attorney illegally disclosed his confidential and privileged information by providing Grosso and Longwell with a hypothetical based on

[4] It reads: "Notwithstanding any other law, the evaluator performing an updated evaluation shall include with the evaluation a statement listing all records reviewed by the evaluator pursuant to [section] subdivision (c). The court shall issue a subpoena, upon the request of either party, for a certified copy of these records. The records shall be provided to the attorney petitioning for commitment and the counsel for the person subject to this article. The attorneys may use the records in proceedings under this article and shall not disclose them for any other purpose."

Gordon's social, sexual, criminal, and medical history. Gordon did not make this argument in the trial court. Pursuant to Evidence Code sections 452, subdivision (c) and 459, Gordon has filed a request asking us to take judicial notice of what he contends is the hypothetical. The Attorney General has submitted opposition to the request.

We deny the request for judicial notice. The hypothetical, which is attached as exhibit A to the request for judicial notice, was not offered into evidence at trial or otherwise presented to the trial court for its consideration. (*People v. Jacinto* (2010) 49 Cal.4th 263, 272, fn. 5 ["'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court'"].) Gordon does not attempt to demonstrate he was unable to make the hypothetical available at trial. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207 [motion to present additional evidence was correctly denied because the motion "was unaccompanied by any demonstration that the evidence . . . could not have been made available at trial"]; *In re Natural Gas Anti-Trust Cases* (2006) 137 Cal.App.4th 387, 393 ["Because neither of these materials was introduced as part of the record in the proceedings below, we conclude that they are irrelevant and thus decline to take judicial notice of them"].)

In addition, the hypothetical does not fall within any category identified in Evidence Code section 452, subdivision (c). The hypothetical is not decisional, constitutional or statutory law (*id.*, § 452, subd. (a)), a regulation or legislative enactment (*id.*, subd. (b)), an official act of a branch of government (*id.*, subd. (c)), a record or rule of court (*id.*, subds. (d) & (e)), the law of an organization of nations or of a foreign nation (*id.*, subd. (f)), a fact or proposition of such common knowledge that it cannot reasonably be the subject of dispute (*id.*, subd. (g)), or a fact or proposition that is not reasonably subject to dispute and is capable of "immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (*id.*, subd. (h)).

Gordon contends the Attorney General cannot dispute the authenticity or accuracy of the hypothetical. The Attorney General does indeed dispute the

hypothetical's authenticity and points out there is no indication of who prepared the hypothetical, when it was created, its purpose, or to whom it was provided. (*Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 279, fn. 12 [denying request to take judicial notice because "the articles contain unauthenticated statements with no indication of author, custodian, date of creation, purpose, reliability, or veracity"].) Gordon contends the hypothetical was produced in discovery, however, production in discovery is not a ground for judicial notice. (*TSMC North America v. Semiconductor Manufacturing Internat. Corp.* (2008) 161 Cal.App.4th 581, 594, fn. 4.)

In *People v. McClinton* (2018) 29 Cal.App.5th 738, 758, a panel of this court denied the defendant's request to take judicial notice of a similar hypothetical used by the district attorney to retain an expert witness in an SVPA case. We too deny Gordon's request for judicial notice of the hypothetical. As a consequence, Gordon's argument that the district attorney illegally disclosed confidential information and privileged information is without evidentiary support.

VII.

Motion to Quash Subpoena Duces Tecum

Gordon argues the trial court erred by denying his motion to quash the district attorney's subpoena duces tecum. He argues, first, the district attorney was not entitled to obtain his DSH treatment records except to the extent they were relied upon by the evaluators in conducting their updated evaluations, and, second, the district attorney failed to establish good cause and materiality for each item of records requested by the subpoena.

The district attorney's subpoena duces tecum sought records reviewed or relied upon by Musacco and Owen in preparing their updated evaluations of Gordon. The district attorney was entitled to obtain those documents and records. (*Smith, supra,* 6 Cal.5th at p. 464.) We reject Gordon's contention the district attorney failed to establish good cause and materiality. In the subpoena, the district attorney identified good cause as

"the Petitioner is entitled to review all documents the Dept. of State Hospital evaluators reviewed, relied upon, and/or noted in the determination of [Gordon]'s [sexually violent predator] status" and identified materiality as "[t]he records are material because they were reviewed, relied upon, and/or noted by Dr. Robert Owen and Dr. Michael Musacco in their respective evaluations of [Gordon] and forming their opinion as to [Gordon]'s SVP status." This is a sufficient showing of good cause and materiality. (*Ibid.*; § 6603(j)(1).)

VIII.

Section 6603(j)(1) Equal Protection Challenge

Gordon argues section 6603(j)(1), if applicable to him, violates his equal protection rights in that sexually violent predators are treated less favorably than mentally disordered offenders (MDO's) or MDSO's. In *Smith, supra,* 6 Cal.5th at page 468, the Supreme Court rejected the contention that granting the district attorney access to the sexually violent predator's treatment records would constitute an equal protection violation. The Supreme Court rejected the argument because "Smith does not identify in what way, if any, the statutory schemes associated with designation as either a[n] [MDO] or a[n] [MDSO] operate differently from the SVPA with respect to discovery of these types of records." (*Ibid.*)

Section 5328, which applies to sexually violent predators, MDO's and MDSO's, makes information and treatment records confidential and permits disclosure only in the specified circumstances. (*Id.,* subd. (a).) Section 6603(j)(1), according to Gordon, creates a statutory exception to section 5328 that applies only to sexually violent predators. He argues: "[S]ection 5328 reflects a legislative recognition that disclosing confidences from the treatment process impairs the effective treatment of the mentally ill and is therefore contrary to the best interests of society. When the Legislature enacted section 6603, subdivision (j), it chose to deny SVPs, but only SVPs, the right to keep their information confidential from prosecutors."

Gordon acknowledges that his equal protection argument relies extensively on the briefing in *Smith.* In his disparate treatment argument, Gordon simply responds to contentions made by the district attorney in his supplemental briefing before the California Supreme Court. The Attorney General too candidly acknowledges that his equal protection argument merely incorporates ("frankly, cutting and pasting") the arguments made by the district attorney in *Smith*. The Supreme Court in *Smith* concluded Smith's submission had failed to satisfy the "'required threshold'" of showing "'a credible showing of different treatment.'" (*Smith, supra,* 6 Cal.5th at p. 468.) Because Gordon has not offered anything more than what was presented in *Smith,* we reject his equal protection claim.

IX., X., XI.

Other Issues Related to Section 6603(j)(1)

In argument numbers IX, X, and XI, Gordon challenges the scope and application of section 6603(j)(1). He argues section 6603(j)(1) cannot be applied, either retroactively or prospectively, to him (argument IX); under section 6603(j)(1), the government's access to treatment records is limited to those records used and relied upon in conducting updated evaluations (argument X); and section 6603(j)(1) does not permit disclosure of confidential treatment records to the district attorney's retained mental health expert (argument XI).

In *Smith*, the Supreme Court rejected each of those arguments and concluded that section 6603(j)(1) applies to pending SVPA proceedings, section 6603(j)(1) extends to confidential treatment records used and relied upon in conducting both updated evaluations and replacement evaluations, and confidential treatment records may be disclosed to the district attorney's retained mental health expert. (*Smith, supra,* 6 Cal.5th at pp. 462, 467-468.)

XII.

Submission by Gordon to a Mental Examination

Gordon argues the trial court erred by compelling him to submit to a mental examination by the People's two retained experts. In *Landau I, supra*, 214 Cal.App.4th at pages 25-26, a panel of this court held that, upon a showing of good cause, a trial court may order an alleged sexually violent predator to undergo a mental evaluation by an expert retained by the People. The court reasoned that Code of Civil Procedure section 2032.020, subdivision (a), permits any party to obtain a mental or physical examination of another party, and section 2032.020, as part of the Civil Discovery Act, applies to SVPA proceedings. (*Landau I, supra*, at p. 25; see *Roa, supra*, 11 Cal.App.5th at p. 445 ["A trial court may order an alleged SVP to submit to a mental examination by an expert retained by the People]".)

Gordon also makes an equal protection argument based on *Hudec v. Superior Court* (2015) 60 Cal.4th 815 (*Hudec*). In *Hudec*, the California Supreme Court held that a person who has been found not guilty by reason of insanity has an absolute statutory and constitutional right not to testify at his or her commitment extension hearing. (*Id.* at pp. 818, 826.) Several Courts of Appeal, including a panel of this division, have held that alleged sexually violent predators are similarly situated to those found not guilty by reason of insanity for purposes of whether their testimony can be compelled. (*Flint, supra*, 22 Cal.App.5th at pp. 988-992; *Landau II, supra*, 246 Cal.App.4th at pp. 863-864; *People v. Curlee* (2015) 237 Cal.App.4th 709, 720-721, 722-723.) Alleged sexually violent predators therefore cannot be compelled to testify at trial unless the People make a showing that disparate treatment is justified. (*Flint, supra*, 22 Cal.App.5th at p. 993; *Landau II, supra*, 246 Cal.App.4th at p. 865.) Gordon argues the trial court's order compelled him to be examined by Grosso and Longwell and was, therefore, "the functional equivalent" of compelling him to testify at trial.

The trial court did not, however, compel Gordon to submit to mental examinations. The court's order "authorized" Grosso and Longwell to conduct mental examinations of Gordon that would consist of "interviews" of him covering certain topics. The order was not directed to Gordon and did not compel him to answer questions or even to show up to the interviews. If Gordon failed to appear or refused to answer questions, he could not have been subject to a penalty, such as contempt.

XIII.

Due Process Challenge

Gordon argues the SVPA, in particular its requirement of an indeterminate term of confinement, violates his due process rights because a person who is no longer a sexually violent predator cannot petition for immediate unconditional discharge. The committed person must instead first petition for one year of conditional release.

In *People v. McKee* (2010) 47 Cal.4th 1172, 1188-1193 (*McKee*), the California Supreme Court held the indeterminate commitment term of the SVPA does not violate the committed person's due process rights because the SVPA provides a means of obtaining release upon a showing the committed person no longer meets the requisites for commitment. The requirement that the committed person has the burden of proving by a preponderance of the evidence that he or she is no longer a sexually violent predator does not violate due process. (*Id.* at p. 1191.)

Under the SVPA addressed by *McKee*, the DSH, based on annual reports and examinations of the committed person, could authorize that person to bring a petition for conditional release or for unconditional discharge. Even without DSH authorization, the committed person could bring a petition for conditional release or for unconditional discharge. (§ 6608, former subd. (a); see *McKee, supra*, 47 Cal.4th at p. 1187.)

In 2013, after *McKee*, the SVPA was amended to change the procedures for postcommitment release. (Stats. 2013, ch. 182.) The SVPA no longer allows the committed person to petition for immediate unconditional discharge without DSH

authorization. Without DSH authorization, a committed person may in the first instance petition only for conditional release (§ 6608, subd. (a); see *People v. LeBlanc* (2015) 238 Cal.App.4th 1059, 1069, fn. 7) and must complete one year of conditional release before petitioning for unconditional discharge (§ 6608, subd. (m)). "Unconditional discharge is still available in the first instance with the recommendation of the Director of State Hospitals." (*People v. LeBlanc*, *supra*, at p. 1069, fn. 7, citing §§ 6604.9, subds. (b) & (d), 6605, subd. (a)(1).)

Does this change to the SVPA mean its indeterminate commitment requirement violates due process? Involuntary civil commitment for an indeterminate term does not violate due process if two conditions are met. First, the state must prove "'by proof more substantial than a mere preponderance of the evidence"' that the committed person is dangerous and suffers a mental illness or mental abnormality. (*McKee, supra*, 47 Cal.4th at p. 1189.) Second, a person "may not be held in civil commitment when he or she no longer meets the requirements of such commitment." (*Id.* at p. 1193; see *Jackson v. Indiana* (1972) 406 U.S. 715, 738 ["due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"].)

Requiring the committed person to first complete a year on conditional release, absent a recommendation of unconditional discharge by the DSH, before obtaining unconditional discharge does not violate those precepts. Conditional release is a reasonable step to ensure the committed person no longer poses a danger. In *People v. Beck* (1996) 47 Cal.App.4th 1676, 1681-1684, the Court of Appeal held the requirement that defendants found not guilty by reason of insanity spend a year in an outpatient program before being restored to sanity does not violate due process. (*Ibid.*) The court explained that the commission of a crime justified the state taking "great care in evaluating the offender prior to the release into the community." (*Id.* at p. 1684.) "[T]he process of evaluating the defendant for a prolonged period in a noninstitutional setting

has obvious merit. It provides a 'trial run' for the defendant's release, conducted under conditions resembling what the defendant will later find in the community." (*Ibid.*)

Likewise, the finding that a person is a sexually violent predator justifies taking great care in determining that person no longer poses a risk of danger before granting unconditional release into the community. The requirement of a one-year period of conditional release is a reasonable and meritorious means of assessing that risk.

Gordon's due process challenge to the SVPA is not limited, however, to the language and requirements of the statute itself. Gordon also makes what might be called an institutional argument based on the manner in which the annual examination and release provisions of the SVPA are carried out in practice. He argues that, due to delays in bringing a conditional release petition to trial, finding suitable housing during the period of conditional release, and bringing an unconditional discharge petition to trial, and due to institutional biases, a committed person who no longer is a sexually violent predator is more likely to die in confinement than obtain unconditional discharge.

In support of this argument, Gordon asks us to take judicial notice of DSH responses he received to a request under the California Public Records Act (Gov. Code, § 6250 et seq.). The responses, attached as Exhibit B to Gordon's request for judicial notice, are figures showing, among other things, the number of times in which annual DSH evaluations conducted pursuant to section 6604.9 determined the committed person no longer is a sexually violent predator.

Gordon contends the records from the DSH show that since August 2011 the DSH has conducted 1,099 annual evaluations but found only 18 persons ready for unconditional discharge and 35 persons ready for conditional release. In contrast, 102 persons died while involuntarily committed under the SVPA. These figures, according to Gordon, show "the system is rarely ever releasing or recommending for release dying patients." Added to that, Gordon asserts, delays in bringing petitions for conditional release or unconditional discharge to trial, plus the requirement that a committed person

remain in confinement for a year before bringing a petition, means a petition for unconditional discharge under section 6608 cannot reasonably be expected to result in the committed person's unconditional discharge for three years or more.

There are a number of problems with Gordon's institutional argument. First, Gordon is not appealing from an order seeking conditional release or unconditional discharge. At this stage we cannot tell whether the conditional release or unconditional discharge provisions of the SVPA, if and when applied to Gordon, would violate his due process rights. Thus, his due process argument is not yet justiciable. "'It is well-settled law that the courts will not give their consideration to questions as to the constitutionality of a statute unless such consideration is necessary to the determination of a real and vital controversy between the litigants in the particular case before it. It is incumbent upon a party to an action or proceeding who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby.'" (*Bocklett, supra*, 22 Cal.App.5th at p. 898 [declining to determine whether SVPA conditional release and unconditional discharge provisions violate equal protection].)

Second, Gordon did not make this argument in the trial court and therefore forfeited it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) Third, we deny Gordon's request for judicial notice and, therefore, his argument lacks evidentiary support. Gordon has not explained why he did not present Exhibit B to the request for judicial notice to the trial court, either as an exhibit at trial or in a motion for a new trial. (*Bocklett, supra,* 22 Cal.App.5th at p. 898, fn. 2 [denying request for judicial notice of similar DSH information because the defendant did not present it to the trial court].)

Finally, even if we were to consider Exhibit B to the request for judicial notice and accept as true the figures presented in it, we would not be compelled to agree with Gordon's interpretation of them. A reasonable inference to be drawn from the DSH figures is that very few persons committed as sexually violent predators become ready for

conditional release or unconditional discharge. That could be because of institutional bias (as Gordon claims), but it could also be that the treatment provided by the DSH is ineffective, mental disorders leading to a sexually violent predator finding are intractable, or persons committed as sexually violent predators are resistant to treatment. (See *People v. McKee* (2012) 207 Cal.App.4th 1325, 1347 ["SVP's are less likely to participate in treatment, less likely to acknowledge there is anything wrong with them, and more likely to be deceptive and manipulative"].)

DISPOSITION

The order of commitment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.